STATEMENT OF
LESLIE E. SILVERMAN
COMMISSIONER
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BEFORE THE
SPECIAL COMMITTEE ON AGING
U.S. SENATE

CONCERNING
TREATMENT OF RETIREE HEALTH BENEFITS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Good afternoon Mr. Chairman and members of the Committee. I am Leslie Silverman, Commissioner of the Equal Employment Opportunity Commission (EEOC or Commission). Our Chair, Cari M. Dominguez, could not be here today and asked that I come in her stead. I am here to discuss the Commission's decision to permit employers to remain in compliance with the Age Discrimination in Employment Act (ADEA) when they coordinate the retiree health benefits they provide with Medicare eligibility.

I am pleased that you have convened this hearing to discuss this important issue. The Commission's draft final rule has received a lot of attention in the media recently and some of the stories have suggested that the Commission is fostering age discrimination. The Commission is proud of our efforts to protect the rights of older Americans against age discrimination in employment. We have scored many victories over the years that have served to level the playing field for older workers and retirees. Just last year, the Commission obtained one of the largest settlements in our history on behalf of 1,700 retired public safety officers who had been subjected to age discrimination in the disability retirement benefits they received from the California Public Employees' Retirement System. In light of our commitment to fighting age discrimination, the Commission is concerned that our position on the treatment of retiree health benefits under the ADEA has been misunderstood.

On behalf of the Commission, I appreciate the opportunity to clarify the Commission's draft final rule. As you know, the rule provides a narrow exemption from ADEA prohibitions for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable state health plan. The draft final rule, and the events that gave rise to it, can only be understood against the backdrop of the fact that employers have no legal obligation to provide any health benefits to retirees.

Let me begin by explaining the history of the draft final rule, including the economic and legal conditions that prompted the Commission's action. This background explains why the Commission concluded that it should promulgate an ADEA exemption for the practice of coordinating retiree health benefits with Medicare.

A PYRRHIC VICTORY - THE *ERIE COUNTY* DECISION

In the case of *Erie County Retirees Ass'n v. County of Erie*, a group of Medicare-eligible retirees sued their former employer, alleging that by providing health benefits to them that were less than those it provided to retirees not yet eligible for Medicare, the county was discriminating against them based on their age. These retirees, all age 65 and over, alleged that they had been given fewer choices of health care and had to pay higher premiums than the non-Medicare-eligible retirees who were all under age 65 and that this violated the ADEA.

The employer in *Erie County* provided health benefits for employees and retirees. Retirees were offered one of two plans depending upon whether or not they were Medicare eligible. If the employee retired before reaching Medicare eligibility, the employer provided a "bridge" style health benefit until the employee became eligible, usually at age 65. The bridge plan was a hybrid point-of-service and HMO plan, so named because it bridges the period between the individual's retirement and the individual's eligibility for Medicare. Once a retiree became eligible for Medicare, he or she was converted to a plan that took Medicare benefits into account. Those retirees had to pay the premium for Medicare Part B, which was more than the premium paid by the non-Medicare eligible retirees. The health benefits for Medicare-eligible retirees were provided through an HMO that had lower deductibles and co-payments, but more restrictions on choice of provider than the bridge plan.

The district court agreed with the retirees that, because Medicare eligibility depends on age, providing different retiree benefits based on Medicare eligibility was age discriminatory. However, it also held that retirees are not covered by the ADEA. The retirees appealed.

In January 2000, the Commission filed an *amicus curiae* brief in the retirees' appeal, arguing, consistent with previous Commission positions, that 1) the ADEA does cover retirees and 2) treating people differently based on a criterion – in this case, Medicare eligibility – that is itself based on age constitutes age discrimination. The Third Circuit Court of Appeals agreed with the Commission and found that coordinating retiree health benefits with Medicare eligibility violates the ADEA unless the employer could satisfy the statute's "equal cost/equal benefit" defense. To do this the employer, Erie County, would have to prove that the health benefits it provided to Medicare-eligible retirees were equal to the benefits provided to retirees not yet eligible for Medicare, or that it was expending the same cost on health benefits for each group of retirees.

The Third Circuit remanded the case to the district court to consider whether the defense could be established. On remand, the district court concluded that the county had failed to establish the defense. It found that Medicare-eligible retirees paid more for less generous benefits than did the younger retirees.
Directed by the court to come into compliance with the equal cost/equal benefit test, Erie County ultimately equalized the retiree health benefits it offered -- not by improving the benefits for its

Medicare-eligible retirees -- but by requiring younger retirees to pay more for health benefits that provided fewer choices.

IMMEDIATE CRITICISM OF *ERIE COUNTY*

The *Erie County* decision marked the first time that an appellate court held that the long-standing practice of coordinating retiree health benefits with Medicare eligibility violated the ADEA. Just two months after the Third Circuit issued this historic decision, in October 2000, the Commission adopted the *Erie County* ruling as its national enforcement policy. Pursuant to this enforcement policy, the Commission also filed charges against school districts and unions in the Midwest with retiree bridge plans that were not in compliance with the *Erie County* rule.

The Commission's adoption of the *Erie County* rule was widely condemned, particularly by teachers, unions, and school boards. In addition, the Commission heard from members of the Senate and House of Representatives from both parties who voiced concerns about the policy, or sought to gather further information on behalf of constituents.

Unions contended that the rule not only threatened current retiree health benefits, but made it increasingly difficult to negotiate for the provision of benefits for future retirees. Other critics argued that because employers – particularly school districts and other public employers – lacked the resources to provide health benefits to retirees indefinitely, the Commission's new position would force employers to eliminate retiree health benefits entirely, or to provide fewer benefits to retirees under age 65 who lack access to Medicare benefits. In other words, the Commission heard over and over again that the *Erie County* rule would not protect or improve benefits for Medicare-eligible retirees, but, instead, would ultimately cause a reduction in retiree health benefits. As noted earlier, these fears were realized by the plaintiffs in *Erie County*.

In May 2001, the General Accounting Office (GAO) issued a report to the Senate Committee on Health, Education, Labor and Pensions, entitled, "Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion." The report concluded that many employers were eliminating health benefits for retirees. Although it cited cost, changing demographics, and changed accounting rules as the primary reasons for the declining coverage, it also said that the *Erie County* ruling might provide an additional incentive for employers to eliminate retiree health benefits.

In light of the criticism and the GAO report, in August 2001 the Commission decided to revisit the *Erie County* issue and further study the relationship between the ADEA and retiree health benefits. For the next several months, Commission staff met with a wide range of stakeholders to discuss the impact of the *Erie County* rule. All of the stakeholders, including employers, retiree representatives, labor unions, and benefit consultants told us that most existing employer provided retiree health benefit plans did not comply with the *Erie County* rule.

ALTERNATIVES EXPLORED

After an in-depth examination of this problem, the Commission determined that it was in the public interest for it to act to end the *Erie County* rule's incentive for employers to reduce or eliminate retiree health benefits. The Commission explored various ways to do this.

In particular, it focused on whether a variant of the equal cost/equal benefit test could be utilized for employer-provided retiree health plans. For example, the Commission considered modifying the equal cost/equal benefit test to ensure that most existing retiree health plans would meet the equal benefits standard. However, any such showing would require that employers make complex comparisons between multiple objective and subjective variables, including the types of plans offered, the levels and types of coverage provided in each plan, the Medicare premium assessed for each gender in each geographical area, and the deductibles and co-pays charged in each plan. Because fees and benefits change from year to year, all of these calculations would need to be made, with any necessary resulting plan adjustments, on an annual basis. Such calculations, the Commission concluded, would be extraordinarily burdensome for employers, unions and municipal governments that wished to provide their retirees with health benefits.

Similarly, the Commission found that it would be extremely difficult to quantify the "costs" of providing retiree health benefits. In fact, health benefits for retirees under the age of 65 are uniformly more costly for employers because the employer is the sole source of the benefit. The Commission considered whether the costs of Medicare premiums paid during workers' careers might somehow be factored in for purposes of establishing equal cost, but could not develop a fair and workable way to make the calculation. Medicare fees paid by employers are paid into a general fund, rather than into individual employee accounts. Moreover, by the time they reach retirement, most employees have previously worked for other employers that have also contributed Medicare fees on their behalf. Further complicating the matter, any such calculation would have to factor in the employee's portion of costs. Employees contribute to the cost of Medicare through FICA taxes that are also paid to the general fund and are tied to the employee's compensation. In addition, employees pay a portion of their own health-care costs under Medicare and their claims may vary greatly from year to year. Such calculations would be even further complicated for employers who have multiple employer-sponsored plans with different benefits and would be insurmountably complex for small employers.

Even assuming that a formula could be devised that would allow employers to prove that they were providing equivalent benefits or expending equivalent costs, the Commission feared that employers would rather lower or eliminate benefits, as done by the employer in *Erie County*, than perform the complex calculations necessary to ensure they are offering an equal benefit or paying the same cost. The Commission also had significant concerns that any attempt to modify the equal benefit/equal cost rule for purposes of coordinating retiree health benefits with Medicare would carry over to areas beyond retiree health benefits, thereby diluting the Act's protections.

Given all of these difficult problems and concerns, the Commission rejected the idea of attempting to redefine the equal cost/equal benefit defense. It concluded that a narrow exemption

from the prohibitions of the ADEA was the most effective way to assure that the Act did not cause further erosion of retiree health benefits and that its protections otherwise remained intact.

PROPOSED RULE

Given that many factors are eroding health care coverage, the Commission concluded that it should eliminate any contribution the ADEA might be making to the problem. Therefore, on July 14, 2003, the EEOC issued a Notice of Proposed Rulemaking (NPRM) proposing that the ADEA would not apply to the practice of coordinating retiree health benefits with eligibility for Medicare.

EXEMPTION AUTHORITY

The exemption was promulgated under the Commission's broad authority in Section 9 of the ADEA, 29 U.S.C. § 628, which provides that EEOC "may . . . establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest."

On its face, the exemption language makes clear that Congress believed that there would be instances in which applying the ADEA's prohibition against age discrimination would have unintended results that would be contrary to the public interest. Accordingly, it vested the enforcement agency with authority to correct such problems.

In this circumstance, applying the Act's prohibitions to the practice of coordinating retiree health benefits with Medicare was having the unintended consequence of encouraging employers to end or limit their retiree health benefits and, as such, was contrary to the public interest. Thus, the Commission concluded that a narrow exemption was necessary and proper in the public interest.

The Commission also determined that an exemption was consistent with the purposes of the ADEA. As the Commission stated in the preamble to the proposed rule, one of the Act's stated purposes is to "find ways of meeting problems arising from the impact of age on employment." Given the continuing decline in the availability of employer-provided retiree health benefits and the additional disincentive to provide such benefits created by the *Erie County* rule, the exemption reasonably addresses problems confronting older Americans.

The exemption in the proposed rule is narrowly tailored to apply only to the coordination of employer-sponsored retiree health plans with Medicare and similar state plans. In essence, it enables employers to continue to provide the types of retiree health benefits that are provided today without fear of violating the age discrimination law. It does not require any cut in benefits and is not intended to encourage employers who already offer bridge, supplemental or wrap-around plans to alter those benefits in any way.

COMMENTS ON THE PROPOSED RULE

The Commission received 44 organizational comments in response to the NPRM. Twenty-seven commenters expressed support for the proposed exemption, including 16 organizations that requested no revisions to the proposed rule. The Commission also received approximately 30,000 letters from individual citizens. Most of these individual comments were a form letter generally expressing concern about providing an exemption for the practice of coordinating retiree health benefits with eligibility for Medicare or a comparable state health benefits program.

Several of the organizations that supported the proposal commented that *Erie County* was responsible for further erosion of retiree health benefits. For example, the American Federation of Teachers, representing 1.2 million workers, said that many school districts and public employers offering retiree health benefits concluded that their benefit structures could be challenged under the *Erie County* rule, and, as a result, chose to end or reduce their benefits for all retirees. AFT explained, "[i]n the post-*Erie County* period[,] older workers faced the reality of working until they were much older or retiring without retiree health benefits." Several school districts, boards, and associations echoed the concerns of AFT. The National Education Association, which represents 2.7 million employees nationwide, further expressed concerns that "as long as education employers are subject to potential ADEA liability under the reasoning of the court in *Erie County*, many employees will lose their employer-provided retiree medical insurance benefits altogether."

The comments also showed that the problem created by the *Erie County* decision was not limited to professional educators. The Society for Human Resource Management, the nation's largest organization devoted to human resource management, with 175,000 members, commented that the Commission's earlier adoption of the *Erie County* rule caused "the organizations they represent to have grave concerns about the potential application of the ADEA to employer-sponsored retiree health benefits. . . . With no regulatory protection . . . many employers who had offered retiree health that changed when a retiree reached Medicare age opted to eliminate retiree health care coverage altogether." The National Rural Electric Cooperative Association informed the Commission that "without this clarification . . . many NRECA members will be forced to discontinue providing benefits to both pre- and post-Medicare[-]eligible retirees — effectively leaving most, if not all, of these more than 7,000 retirees with no health insurance until they become Medicare[-]eligible."

The most numerous and detailed comments in opposition to the proposed rule came from AARP and its individual members. Since AARP is here today to explain their position on our rule, there is no need for the Commission to elaborate further here.

DRAFT FINAL RULE

After considering the public comments, the Commission concluded that the evidence they presented supported the exemption. The rule's supporters produced evidence that the *Erie*

County rule has had, and would continue to have, the unintended consequence of diminishing employer-provided retiree health benefits. The rule's opponents, however, produced no contrary evidence. Thus, the majority of the Commissioners feared that, if the Commission failed to act, many more retirees would lose their benefits as a result of the *Erie County* policy. Accordingly, the Commission's draft final rule would exempt from the ADEA the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare.

When the draft final rule was submitted to the Commission for a vote, four of the five Commissioners voted to approve it. The fifth Commissioner, Stuart Ishimaru, voted to put it on the Commission agenda, necessitating the convening of a public Commission meeting on the matter in accordance with the Sunshine Act. During that meeting, held on April 22, 2004, the rule and its history were formally presented to the Commissioners by the Commission's Office of Legal Counsel. Commissioners gave opening statements, asked questions of the presenting staff and fully deliberated before voting to approve the rule. The vote was 3-1, with Commissioner Ishimaru voting against the rule. Commissioner Paul Steven Miller, who had originally voted to approve the rule, was unable to be there that day. The Commissioners' statements and a complete transcript of the meeting proceedings are set forth on the Commission's web site at www.eeoc.gov.

Once the Commission approved the draft final rule, it was circulated to appropriate federal agencies for review, pursuant to Executive Order 12067. These agencies reviewed and commented on the proposed rule when the NPRM was circulated to them in July 2003. Under E.O. 12067, the agencies have 15 working days for review and comment.

If no changes are necessary after the interagency coordination process, EEOC will then submit the draft final rule for OMB review. OMB has up to 90 days to review the draft final rule before EEOC publishes it in the Federal Register. If either the interagency process or OMB review yields changes to the draft final rule, the Commissioners must vote again to adopt the amended rule.

CONCLUSION

The Commission believes it has acted appropriately for the benefit of retirees. The Commission recognizes that there has been concern and uncertainty among older Americans about the action we are taking. But we believe that this is due to misunderstanding. Several commentaries have erroneously reported that we are acting to establish a new retiree health benefit system that takes into account Medicare eligibility. That system already exists.

When it adopted the *Erie County* rule, the Commission believed that that rule would protect health benefits for retirees. In practice, however, that rule threatens to have the opposite effect – it encourages employers to curtail or eliminate retiree health benefits. The Commission views such a consequence as contrary to the public policy of encouraging health benefits for retirees, and contrary to the spirit of the ADEA.

The Commission cannot compel employers to provide health benefits for its retirees. It also cannot control the spiraling costs of health care, nor affect the way businesses must account for those costs on their balance sheets. However, the Commission can ensure that its rules do not serve as an additional incentive to decrease retiree health benefits. After studying the issue for three years, the Commission concluded that there was only one way it could end the negative incentive created by the *Erie County* decision. The Commission's new rule, providing a narrow exemption from ADEA prohibitions for the coordination of health benefits with Medicare, would remove this incentive.

Mr. Chairman, EEOC remains committed to the vigorous enforcement of the ADEA and to the protection of older workers and retirees.

I thank you for your and the Committee's time and attention to this important matter.